TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 62.

ABRAHAM WOLFF, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 26, 1904.

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In the Court of Appeals of the District of Columbia

ABRAHAM WOLFF, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 1238.

a Supreme Court of the District of Columbia.

ABRAHAM WOLFF, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } No. 41533. At Law.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:—

1 *Declaration.*

Filed October 27, 1896.

In the Supreme Court of the District of Columbia.

ABRAHAM WOLFF, Plaintiff,
against
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 41533.

The plaintiff, Abraham Wolff, sues the defendant, The District of Columbia, a body corporate and municipal, duly constituted and existing under the laws of Congress; for that whereas (1) the said defendant before and at the time of the committing of the grievances hereinafter next mentioned was and is a body corporate and municipal in whom was then duly, legally and exclusively entrusted and vested the power and jurisdiction and the duty at all times to keep all and singular the several streets, including the sidewalks thereof, within said District of Columbia, open as public streets and passageways for all persons to go, return, pass and repass at their free will and pleasure, without molestation or injury, and without the defendant suffering or maintaining obstruction, nuisance or incumbrance therein to be made or to exist to safe travel by wayfarers. That

Louisiana avenue in the city of Washington within the aforesaid District of Columbia is, and at the time hereinafter mentioned was, one of the aforesaid public streets, and having a foot path or sidewalk along the north side thereof, for the ordinary and regular travel of wayfarers. That it was especially and exclusively within
2 the power and jurisdiction and was a part of the duty in that behalf of the defendant to keep and maintain the sidewalks of said city, including the aforesaid sidewalk and every part thereof, free from all obstruction, nuisances and incumbrances, and fit for safe travel of all wayfarers, including the plaintiff.

Yet the said defendant, well knowing the premises, while being vested and entrusted with said power, jurisdiction and duty, did, to wit, on the 27th day of October 1895 at Louisiana avenue in said city of Washington, and within the aforesaid jurisdiction of the defendant, in breach of its aforesaid duty, wrongfully, negligently and unjustly, and without taking any precautions whatsoever in the premises, allow and suffer a certain large stone several inches in height above the surface of said sidewalk, usually termed a carriage step, to be securely fastened into and to remain fastened into and to obstruct and incumber and impede that part of said sidewalk which was opposite and in front of a certain house to wit, known as No. 625 Louisiana avenue on the north side of said avenue, and part of the thoroughfare thereof and within the jurisdiction of the defendant, and did also then and there wrongfully, negligently and injuriously keep and contain the said stone and obstruction therein, and during the night-time of that day, and while said avenue or street was enveloped in darkness, without, as the defendant was then bound to do, fixing or placing or causing to be fixed or placed any light or signal at or near said stone, to denote or show that the same was so there as aforesaid, and without, as the defendant was then bound to do, fixing or placing any guard or screen around said stone, and without, as the defendant
3 was then bound to do, placing while said stone was so enveloped in darkness, any watchman or other person to warn wayfarers, including this plaintiff, of the existence, position and location of said stone, and without, as the defendant was then bound to do, doing some act or thing to warn wayfarers, including this plaintiff, of the existence, position and location of said stone; by means and in consequence of which said negligence, improper conduct and omissions of the defendant in that respect, and not otherwise, afterwards, to wit, in the night-time of the said day, and while the said stone was enveloped in darkness, and during the omission as aforesaid of each and all of the precautions as aforesaid on the part of the defendant, to wit, at or opposite and within 30 feet of the messuage to wit No. 625 on the north side of Louisiana avenue in said city, and on the aforesaid sidewalk, the plaintiff while lawfully passing along and over said sidewalk, and being justifiably ignorant of the existence of said stone, stumbled and tripped against, and fell over the said stone, and the plaintiff thereby and solely by means thereof, and not otherwise, and without any neglect or default on

his part, then and there became and was greatly hurt, bruised, cut, wounded, maimed and shocked, and had his right leg fractured and broken, and was hindered and prevented from attending to his lawful business of a bartender, and lost the gains and the profits which he otherwise and but for the aforesaid grievances would have made, and was put to great loss and costs in medical attendance, appliances and services in respect of the aforesaid bodily injuries.

4 Wherefore the plaintiff, all this considered, brings this suit and claims damages in the sum of $25,000.00 besides costs.

J. MILLER KENYON AND
DAVID M. NEUBERGER,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the service hereof; otherwise judgment.

J. MILLER KENYON AND
DAVID M. NEUBERGER,
Attorneys for Plaintiff.

Amended Declaration.

Filed August 20, 1901.

In the Supreme Court of the District of Columbia.

ABRAHAM WOLFF, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 41533.

The plaintiff, Abraham Wolff, sues the defendant, The District of Columbia, a body corporate and municipal, duly constituted and existing under the laws of Congress; for that whereas the said defendant, before and at the time of the committing of the grievances hereinafter next mentioned, was and is a body corporate and municipal and — whom was then duly, legally and exclusively entrusted and vested the power and jurisdiction and the duty at all times to keep all and singular the several streets, including the sidewalks thereof, within said District of Columbia, open as public streets and passageways for all persons to go, turn, pass and repass at their free will and pleasure, without molestation or injury, and without the defendant suffering or maintaining obstruction, nuisance or incumbrance therein to be made or to exist to safe travel to wayfarers. That C street northwest in the city of Washington within the aforesaid District of Columbia is, and at the time hereinafter mentioned, was one of the aforesaid public streets, and having a foot path or sidewalk along the south side thereof, for the ordinary and regular travel of wayfarers. That it was especially and exclusively within the power and jurisdiction and was a part

5

of the duty in that behalf of the defendant to keep and maintain the sidewalks of the city, including the aforesaid sidewalk and every part thereof, free from all obstruction, nuisance and incumbrances, and for safe travel of all wayfarers, including the plaintiff; yet the said defendant, well knowing the premises, while being vested and entrusted with such power, jurisdiction and duty, did, to wit, on the 27th day of October, 1895, at C street, northwest in said city of Washington, and within the aforesaid jurisdiction of the defendant, in breach of its aforesaid duty, wrongfully, negligently and unjustly, and without taking any precautions whatsoever in the premises, allow and suffer a certain large stone several inches in height above the surface of the sidewalk, usually termed a carriage step, to be securely fastened into and remain fast-
6 ened into and to obstruct and incumber and impede that part of said sidewalk which was opposite and in front of a certain house, to wit, known as Sae-gerbund hall between 3rd and 4½ streets on C street, northwest, on the south side of said street, and part of the thoroughfare thereof and within the jurisdiction of the defendant, and did also then and there wrongfully, negligently and injuriously keep and contain the said stone and obstruction therein, and during the night-ime of that day, and while said street was enveloped in darkness, without, as the defendant was then bound to do, fixing or placing or causing to be fixed or placed, any light or signal at or near said stone, to denote or show that the same was so there as aforesaid, and without, as the defendant was then bound to do, placing while said stone was so enveloped in darkness, any watchman or other person to warn wayfarers, including this plaintiff, of the existence, position and location of said stone, and without, as the defendant was then bound to do, fixing or placing any guard or screen around said stone, and without, as the defendant was then bound to do, doing some act or acts or other thing to warn wayfarers, including this plaintiff, of the existence, position and location of said stone; by means and in consequence of which said negligence, improper conduct and omission of the defendant in that respect and not otherwise, afterwards, to wit, in the night-ime of the said day, and while the said stone was enveloped in darkness, and during the omission as aforesaid of each and all of the precautions as aforesaid on the part of the defendant, to wit, at or opposite and within thirty (30) feet of the messuage to wit, No. 312 C street, northwest, on the south side of said street, in said city, and on the
7 aforesaid sidewalk, the plaintiff, while lawfully passing along and over said sidewalk, and being justifiably ignorant of the existence of said stone, stumbled and tripped against and fell over the said stone, and the plaintiff thereby and solely by means thereof, and not otherwise, and without any neglect or default on his part, then and there became and was greatly hurt, bruised, cut, wounded, maimed, and shocked, and had his right leg fractured and broken, and the same was so injured that it had to be amputated above the knee, and he was hind-red and prevented from attending to his

lawful business of a bartender, and lost his gains and profits which he otherwise and but for the aforesaid grievance, would have made, and was put to great loss and costs in medical attendance, appliances and services in respect of the aforesaid bodily injuries.

Whereof the plaintiff, all this considered, brings this suit and claims damages of the sum of twenty-five thousand dollars ($25,000.00) besides costs.

JOHN C. GITTINGS,
D. W. BAKER,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the service hereof; otherwise judgment.

JOHN C. GITTINGS,
D. W. BAKER,
Attorneys for Plaintiff.

8 *Plea.*

Filed August 22, 1901.

In the Supreme Court of the District of Columbia.

ABRAHAM WOLFF, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 41533.

The defendant for plea to the plaintiff's amended declaration, filed herein, says it is not guilty in manner and form as alleged.

A. B. DUVALL,
C. A. BRANDENBURG,
Attorneys for Defendant.

Joinder of Issue.

Filed September 20, 1901.

In the Supreme Court of the District of Columbia.

ABRAHAM WOLFF, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 41533.

The plaintiff joins issue upon defendant's plea.

JOHN C. GITTINGS,
D. W. BAKER,
Attorneys for Plaintiff.

9 A. B. Duvall and C. A. Brandenburg, Esqrs., attorneys for defendant.

GENTLEMEN: Please take notice that the issues hereby joined, the cause being on the calendar, will be tried at the next term of court.

JOHN C. GITTINGS,
D. W. BAKER,
Attorneys for Plaintiff.

Memorandum.

January 15, 1902.—Verdict for defendant.

Supreme Court of the District of Columbia.

FRIDAY, *February* 28, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

ABRAHAM WOLFF, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 41533.

Upon hearing the plaintiff's motion for a new trial, it is considered that said motion be, and hereby is, overruled, and judg-
10 ment on verdict ordered: Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff its costs of suit to be taxed by the clerk, and have execution thereof.

The plaintiff notes an appeal to the Court of Appeals, and the bond for costs on said appeal is fixed in the penal sum of one hundred dollars.

Memorandum.

March 7, 1902.—Appeal bond filed.

Memoranda.

April 18, 1902.—Bill of exceptions submitted to court and time to file transcript extended to June 2, 1902.

May 29, 1902.—Time to file transcript further extended to July 1, 1902.

11 Supreme Court of the District of Columbia, June 30, 1902.

ABRAHAM WOLFF
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 41563.

Now comes here the plaintiff by his attorneys and prays the court to sign, seal, and make part of the record his bill of exceptions taken during the trial hereof, and heretofore submitted, now for then, which is accordingly done.

12 *Bill of Exceptions.*

Filed June 30, 1902.

In the Supreme Court of the District of Columbia.

ABRAHAM WOLF, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 41533.

Be it remembered that at the trial of this cause on the 8th, 9th, 13th, 14th and 15th days of January, A. D., 1902, before the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, and a jury empaneled and sworn to try the issue between the parties, the plaintiff, in order to maintain issue on his part joined, produced as a witness himself and testified as follows:

That witness' present age is thirty-five, and that on Sunday, October 27, 1895, he resided at 1827 14th street, where he was employed by a Mr. Kozal, and on that day in company with his sister-in-law, Mrs. Francis Wolf, his brother, William Wolf, and his sister-in-law's two children, about eleven o'clock in the day paid a visit to a Mr. Borchardine who resided in the country, and the party remained there until about five o'clock when they started to come to the city in a wagon owned by Mr. Seegar; that a board was put in the center of the wagon for the children to sit on, and the witness sat in front of the wagon with Mr. Seegar and Mr. Borchardine. Witness can hardly remember, but thinks he changed his position in the wagon on the way coming in. Witness does not know how far distant from the city Mr. Borchardine's place was but says it took almost three hours if it did not take longer than that to drive from there to Saengerbund hall, and it must have been around nine o'clock when the party arrived at Saengerbund hall. Mr. Seegar drove the wagon on the way back to the city. We stopped
13 at the Saengerbund corner and went in, only Mr. Borchardine and myself. My brother and my sister-in-law and the other party were sitting in the wagon and they would not come in. We went inside and bought one glass of beer and a cigar and came right out. We were not in the place five minutes because I hurried him out. I said we cannot leave them to sit out there. Being asked where the wagon stopped in reference to the Saengerbund hall, the witness said: Well, this is Saengerbund hall (indicating position) and the wagon stopped, if this was the step of the wagon, about that far from it (indicating) when we got out.

Q. Wait one moment. Take this post here (indicating) this gate post, in reference to the Saengerbund hall; and this opening is a street? A. Yes.

Counsel for the plaintiff then made a drawing of the locality and the witness indicated the location of the building by making a mark on the drawing and the witness stated:

I should judge the wagon came around from 4½ street and went east up C street and (indicating) when witness came out of the Saengerbund hall the wagon was on this side, on the 4½ Street side. It turned around, and the witness locates the wagon by making three marks on the drawing and states that the outside mark is the end of the wagon. The wagon was in here, not quite so far around.

Upon being asked to repeat this answer, witness said: The wagon stood not quite two feet away from the stone after I fell over it, the horse facing west towards 4½ street.

Q. Do you mean the rear end of the wagon or the side of the wagon from the stone? A. Certainly the side of the wagon, and the back was away from the stone.

14 Upon being asked whether there were any lights where the stone was, witness answers: "I could not say whether there was any light there or not. I could not say whether there were any lamps there or not; but it was dark, I know that; coming out of the light house it was dark naturally. There was no light whatever. The trees were in full bloom at the time and covered almost from one side of the street to the other and the first time I ever saw that stone was after I fell over it."

Upon being asked to state exactly how he fell, witness says: "Coming down the stairs and walking out in the street both toes stumbled, hit up against the stone, and over I went that way (indicating) right out into the gutter and I never knew there was anything the matter with me. I still had the cigar in my mouth and I caught myself on my hands, and I turned right over, just turned right over and could not get up until I was picked up.

The color of the stone was brown but I could not say the size of it. I never saw it at all before falling over it; but I had been there, I believe, once before, about nine months before that.

Mr. Borchardine and Mr. Seegar put me in the wagon and drove me to my home, and Dr. Kolopinski was sent for and he found that my leg was broken. I was in bed there about four months, then I stayed there a couple of months more, and then I went to New York, and then went to the Roosevelt hospital in 1896, about nine months subsequent to breaking my leg. Three months of that time I was walking around in New York trying to get cured; they were trying every which way to cure it and they found no cure, and all at once gangrene set in and they amputated the leg afterwards. I remained in the hospital close to three months."

15 Cross-examination:

I gave the information on which the suit was brought to Mr. Neuberger, my counsel in New York, and the information that Mr. Neuberger got was obtained entirely from me.

Extract from the original declaration, filed October 27, 1897, which stated that the injury occurred at Louisiana avenue, in the city of Washington, was read, and the witness was asked: Did you state that? and he answered, No, sir, I stated my whole case to Mr.

Neuberger and made terms with him upon which it should be prosecuted and told him in detail how the accident occurred. Told him where it occurred but did not tell him the number of the house; did not tell him it was on Louisiana avenue and did not know that the declaration was amended. The Sunday of the accident was a very bright day, a nice day. I should call the wagon a grocery wagon or a dayton wagon that we came back in. I know it was a sort of shaded wagon. I know they left the blinds down all the way coming back because it was kind of cool. There was a tail board to the wagon which was up. When we left Mr. Borchardine's place I could not tell you exactly how we were seated. Coming back we changed seats; I know that; we changed seats several times. On account of being pretty crowded up on account of there being five in the wagon and the two children, you know, so that we were pretty well crowded, so that we changed seats, I know that; and when we got in I really do not remember whether I was sitting in front of the wagon. When I got up I could not say whether I was in the front of the wagon or in the back of the wagon. Certainly I changed my seat and they all changed seats because we were crowded up. I was sitting in front with the driver, Mr. Seegar, when I changed my seat, and with Mr. Borchardine. We were sitting in front together and I changed my seat from the front
16 to the back of the wagon. Mr. Borchardine, Mr. Seegar and I were all three on the front seat when I changed my seat. I took my seat in the front of the wagon on the starting, coming away from the farm, and I changed my seat to the back. On the way coming down we stopped on the road. Mr. and Mrs. Wolf and the two children were in the back of the wagon. We stopped once before we reached the Saengerbund hall but I did not get out at any point before that. I believe I am sure I went out the back of the wagon. I cannot tell you what street we came down but we turned into 4½ street, although I had lived in Washington for about four years. The end of the wagon when I got out was past the entrance of the Saengerbund building but I really could not say how far, a foot or three feet or how far it was.

Q. Was this carriage step in front of the doorway or the entrance? A. Well, it seemed to me that I came right down from the middle of the entrance and walked right out towards the street to get in on the other side of the wagon and I fell right over there and it seemed to be about the center of the stairway. I could not describe the stairway down which I came though I had been there once previously, because I never looked at the building from the outside. It was a stone stairway with a stone or iron railing on each side and there was a vestibule to the doorway. There was no light in the vestibule that night but there was a light in the hall, on the inside. When I got out of the wagon onto the sidewalk and looked upstairs certainly I could see the doorway. I got on the wheel and got off the wagon. Certainly I stepped on the wheel and got off the wagon. Being asked which wheel he stepped on witness says: I was sitting in the back part of the wagon and must have stepped

on the back wheel. Being asked whether he got out of the
17 rear of the wagon, he says: Yes, sir, I think I did. I think I did get out of the rear of the wagon; no, not out of the rear of the wagon; the rear of the wagon would be the tail board. I could not say it was the tail end or the front; I might have stepped on the off side or the inside of the wheel.

Q. When you got out, did you get out of the front end, the tail end or the side? A. I got out of the side of the wagon. The shades were down certainly, they just hung down there and you lifted them up and got out. I lifted the shades certainly. They were not tightened shades, they just hung down. I lifted them and got out on the side. I did not get over the wheels. Certainly I put my foot on the wheel, but I could not exactly tell you whether it was a front wheel or a back wheel nor can I remember whether I was nearer the front or the back of the wagon. There was somebody sitting on the side of the wagon; not where I got off for I was sitting on that side myself. When I got out the driver was on the front seat and I don't know who was sitting with him now. I could not say where Mr. Borchardine was, whether on the seat in front or in the body of the wagon, and I cannot say which one got out first. I could not really tell you the truth, whether I got out in the street or on the sidewalk. I did not see the carriage step when I got off. I did not see any lamp on the other side of the street for I never looked there. The stars were shining and I knew it was a very bright night. Mr. Borchardine went up the steps to the Saengerbund first, and we were about one step apart. He opened the door and I went in with him. There was a light inside the building, in the hall, in the center of the ceiling, I suppose. I could not tell you
where it was exactly. There was a light, I know that. I came
18 out first. At least we both went out together and I opened the door comimg out and went down first. I could not say how far I was in front of Mr. Borchardine when I went down. I did not say whether he was downstairs or standing at the top of the stairs.

Q. How was it that you went ahead of Mr. Borchardine? You came out first? A. I wanted to get down in the wagon first. I wanted to give him a chance to get in the wagon, and I was going out in the street to get around the wagon to get in on the other side of the wagon so as to waste no time.

Q. So that you were hurrying to get down to the wagon first? A. Not exactly hurrying. I wanted to get down in the street and get in the wagon, so that I walked fast downstairs naturally, and I wanted to get home.

Q. You walked fast down the stairs? A. Came fast down the stairs.

Q. How many stairs did you come down, sir? A. I could not tell you how many stairs there were. I did not count them.

Q. Could you see the wagon from the steps when you came out of the house? A. You could see the wagon. It was dark. You could see the dark shade of the wagon.

Q. Did you notice that the wagon had changed its position? A. Did I notice that the wagon had changed its position? No, sir; I never took notice of it.

Q. It had changed its position, had it not? A. So I understand. I do not know whether it did or not.

Q. When you came out which way was the head of the horse,
19 towards 4½ street or 3d street? A. I could not say whether it was 4½ street or 3d street. When I came out?

Q. Yes. A. When I came out I walked downstairs and I never paid any attention to the horse at all. I came down to get in the wagon.

Q. You saw the wagon, didn't you? A. I saw the wagon.

Q. You say you hastened down to get around and give Mr. Borchardine a chance, did you not? A. Yes, sir; to get around the wagon.

Q. When you went into the house which way was the horse headed? A. Towards 3d street. Of course we came down from 4½ street.

Q. You say you hastened down to get around and give Mr. Borchardine a chance, didn't you? A. Yes, sir, to get around the wagon.

Q. And yet you didn't know whether the horse was headed towards 4½ street or towards 3d street? A. I could not exactly say which way he was headed.

Q. When you went into the house which way was the horse headed? A. Towards 3rd street, because we came down from 4½ street.

Q. You said, in your examination-in-chief, that when you came out the horse had changed—the wagon had changed and turned around, changed its position. A. It was further down. I don't know whether it turned or not. It was further down than when I went in.

Q. How far was the end of the wagon, the tail board of the wagon from the carriage step when you got out of the wagon?
20 A. I did not see the carriage step when I got out of the wagon.

Q. When you came down from the house, how far was the tail end of the wagon from the carriage-step? A. Well, I can hardly say, because I fell over it and laid in the street. I could not say. I could not just measure it. I did not see it at all, the carriage step at the time, or otherwise I would not have fell over it.

Q. You observed that there was a change in the position of the wagon? A. I am not sure. I would not say that there was a change or not.

Q. Didn't you say so a little while ago? A. I don't know whether I said——

Q. Didn't you say——

Mr. BAKER: Just let him answer.

By Mr. DUVALL:

Q. Didn't you say so just a little while ago? A. I believe I did say so a little while ago.

Q. Didn't you mark it on this paper, the changed position? A. No, sir.

Q. Where the end of the wagon was when you got out? A. Yes, sir.

Q. And where the end of the wagon was when you came out of the house? A. Yes, I marked it; but I only marked that as suppositious; I didn't know exactly.

Q. When you came out you observed that the wagon had changed its position, didn't you? A. Yes, sir.

21 Q. And the position had been changed as you marked it on this paper? A. I would not say for sure whether it was or not.

Q. Didn't you testify that it had been changed and was standing as you have marked it there (indicating on drawing)? A. If I marked it there I must have testified to it.

Q. Didn't you mark it there? A. Yes, sir.

Q. Didn't you say so? A. Certainly I must have said so if I put it down there.

Q. Why did you say so if it was not so? You told the truth about it, didn't you? A. I thought I told the truth. I ain't sure of it now.

Q. How many steps did you take at the foot of the Saengerbund steps—how many steps on the sidewalk—before you struck the carriage step? A. I could not tell you how many steps I took.

Q. Well, did you take two? A. I could not say whether it was two, three or four.

Q. Or five or six? A. I could not say how many steps it was. Of course I have not——

Q. Why can you not tell us that? A. I never count my steps as I walk.

Q. You don't know how many steps you took? A. No, sir; how could I remember?

Q. You were hastening along to get to the wagon? A. Not exactly hastening, I was going in a hurry.

Q. In a hurry? A. Yes, sir, not hastening.

22 Q. You saw where the wagon was when you reached the sidewalk? A. When I reached the sidewalk I struck the stone and away I went.

Q. How many steps did you take before you hit the step? A. I could not tell.

Q. Did you hit the stone as soon as you hit the sidewalk, or did you reach the gutter? A. I hit the stone when it was out in the gutter—no, sir not as soon as I hit the sidewalk.

Q. When you hit the sidewalk you had to take some steps? A. Certainly, before I hit the gutter.

Q. You hit the carraige step, didn't you? A. Yes, sir.

Q. And you don't know how many steps you took? A. I haven't any idea.

Q. When you reached the sidewalk, I want to know if you didn't see the wagon? A. Certainly, I saw the wagon.

Q. Certainly you did. How far was it from you? A. From me?

Q. Yes. A. The width of the sidewalk.

Q. How far is that, compared with the distance from you to me? A. I don't know exactly how long the sidewalk is. I have not seen that sidewalk in some time. I don't remember whether it is a wide or a narrow street.

Q. You don't know; is that it? A. I could not tell you whether it is a wide street or a narrow street.

Q. About how far; as far as from you to me? A. No sir, I do not think the sidewalk is that wide.

23 Q. Not as far as that? A. No, sir.

Q. Was this carriage step right in the line from where you were on the sidewalk to the wagon that you were going to get into? A. No, sir; the carriage step was right in the line where I came down the steps, and right straight out.

Q. Out to the wagon? A. The wagon was not standing there. If the wagon had been standing there I could not have fallen out in the street.

Q. The wagon was further down towards 4½ street? A. I don't know now whether it was 4½ street or down towards 3rd street.

Q. You don't know which way it was? A. No, sir.

Q. You knew a little while ago? A. I don't know for sure; I could not say for sure which way it was.

Q. After taking some steps, hurrying along, you are unable to tell us how many steps, you say that both feet struck the carriage step? A. Both feet, just the toes, like, struck the carriage step, and over I went.

Q. Will you explain to the jury how, if you were walking along, those toes could strike the carriage step at the same time? Ordinarily one foot goes before the other. A. Certainly, if you make one step right to it, and it is there, and then you go to put the other foot out and then you hit, and over you go.

Q. Isn't it a fact that you were hastening—running? A. I was not exactly running; I was walking fast.

Q. Trotting? A. No, sir; not trotting, just walking fast.

24 Q. When you struck, both toes struck the carriage step, you say, and it was a brownstone carriage step? A. I said it was brown, because I heard that afterwards, that it was a brown step. Of course I don't know.

Q. It was the ordinary carriage step that we have in the city here? A. I could not tell whether it was an ordinary carriage step or just a brownstone step.

Q. Don't you know that it was the ordinary carriage step that we have here? A. I didn't see it.

Q. Didn't you see it after? A. What?

Q. You saw it, didn't you? A. After I fell over?

Q. Yes. A. I didn't have time to turn around and look at it. I was told that it was brown. I said the stone was brown because I

heard that afterwards; of course I don't know. After I was laid up in bed somebody came and told me. It was a bright moonlight night and the trees were pretty full but I did not count them. I could not say whether the trees were in front of the premises or alongside of the premises. I know there are a plenty of trees through that street. The leaves were just starting to flutter off. I saw them driving down on the wagon. I could see out of the end and back of the wagon as I drove along that the trees were in full bloom on C street.

Q. When you fell, how far did you go from the carriage step? A. I fell right over it; right in the gutter; and kind of raised myself right on my hands; I caught myself on my hands. I fell
25 right out in the street. I could not say whether the carriage step was in a line with the steps or not.

Q. Did your body go into the roadway? A. Right into the street. Right out into the middle of the street.

Q. Your feet were in the street? A. Certainly after I fell over it.

Q. Did your feet land out in the roadway? A. Certainly. After I was struck I was not going to lay up there.

Q. Then do I understand that you fell over and struck the stone and pulled yourself right out into the street? A. No, I did not say I pulled myself out into the street at all, sir.

Q. Where was it that stone hit you? A. Right here (indicating a position in front of the leg midway between the knee and the end of the groin) that is where the break was in the thigh more than six inches above the knee-cap. When I tried to get up, my feet were in the street and I was lying straight out from the curb right towards the other side of the way. The driver came off the wagon as Mr. Borchardine came down, right down the steps after me. He was not in the wagon.

Q. You did not see the carriage step? A. Certainly not, if I had seen it I would not have fallen over it.

Q. If you had looked when you got out of the wagon to go into the Saengerbund, you could have seen that carriage step, could you not? A. I don't know, I never looked.

Mr. GITTINGS: I object to that.

A. (Continuing:) I never looked down into the street; I looked ahead. I always do look ahead when I walk.
26 Q. If you had looked when you came down from the steps you could have seen the carriage step, could you not?

Mr. BAKER: I object, if the court please.

Mr. DUVALL: Why?

Mr. BAKER: The witness has testified that he came down there and did not look, and walked out; and the question of whether if he had looked what might have happened has absolutely nothing to do with this case. The question involved in this case is, in the first place, the negligence of the defendant, and in the next place, if they want to show the negligence of the plaintiff, they ought to show

that he had notice of this defect, and the mere fact that he did not look on this occasion has nothing to do with the question of negligence at all.

The COURT: What he did on this occasion is evidence.

Mr. BAKER: That is right, but not what he could have done.

Mr. DUVALL: Here is a man—I speak now of the last question—who when he came out of the Saengerbund stood facing the wagon, and just below him, and in his line of vision, unobstructed, was this carriage step. Now, I ask this witness if he had looked, if he had observed what he was doing, could he not have seen that step? That is a perfectly competent question.

The COURT: You can answer the question.

Mr. BAKER: We note an exception, your honor.

The WITNESS: Shall I answer the question?

Mr. DUVALL: Yes.

The WITNESS: Certainly I saw the wagon. I could see the wagon; it was high.

Mr. DUVALL: That is not my question.

The stenographer read the question as follows:

Q. If you had looked when you came down the steps, you
27 could have seen the carriage step, could you not? A. Not if I looked ahead of myself. Not if I looked straight out.

Q. Were you intending to fly or to walk? A. No sir, it was dark, I could not see that step.

Q. If you had looked in the direction in which you intended to walk, could you not have seen the carriage step? A. In the direction? No sir, I do not think I could.

Q. Why not? A. Because it was dark. Certainly, if I was standing on the sidewalk and looked, I think I could have seen it if I had looked down.

Q. Exactly. When you reached the sidewalk after you had left the steps? A. Yes sir.

Q. If you had looked in the direction in which you were going, could you have seen the carriage step? A. No sir; I did look in the direction in which I was going, but I was looking right out before me.

Q. What were you looking at? A. I was looking where I was walking.

Q. How were you walking, on the ground? A. What?

Q. If you were looking where you were walking you ought to have been looking on the ground? A. No sir.

Q. What were you looking at? A. I was looking right straight ahead, not with my head down.

Q. Right straight ahead? A. Yes, sir.

Q. At what object? A. Not at any particular object at all.

Q. You were going to the curbstone were you not? A.
28 Yes sir; going to walk out into the street to get around and get into the wagon.

Q. And you intended to go into the roadway and get into the wagon? A. Into the wagon, yes sir.

Q. Did you look in that direction? A. Yes sir, certainly; that is the direction I was looking in.

Q. Did you look to see whether there was a gutter there? A. Certainly, I knew there was a gutter there.

Q. You knew where that was; you could see that, could you not? A. No sir, I could not exactly see it, but I could feel at it. If it was a straight road you can always see a gutter. I could see the middle of the street.

Q. And you knew that you had to go to the gutter? A. Yes sir.

Q. Why did you not look to see where that was? A. I did not walk out and look right on the ground.

Q. You made no observation at all of the point where you put your feet, knowing that you had to come to the curb and to come to the gutter; but you did not look at all; is that it? A. Certainly I looked. I could not see any stone there though. When I went to New York city I was walking on crutches.

On recross-examination certain *paragraphs* were shown by counsel for defendant to counsel for plaintiff and thereupon counsel for plaintiff said:

I will consent that those pictures shall go in evidence. One of said pictures, being a photograph of the Saengerbund house,
29 was shown to the witness who testified that he recollected seeing the building, except that he did not recollect the decorations thereon which were shown in the photograph, and that the building looks that way outside of the decorations. Counsel for plaintiff, thereupon, admitted that photograph shown was the photograph of the building and that it showed the carriage step; and thereupon witness, continuing, said: On the occasion of the injury it seemed to me as though it (carriage step) was almost in the center of the building. The photograph, showing carriage step and building, was exhibited to the jury.

Thereupon, to further maintain the issues on his part joined, the plaintiff produces as a witness Mrs. FRANCIS WOLFF who testified as follows:

That on Sunday, October 27, 1895, the witness in company with her husband, two children and the plaintiff, paid a visit to the country place of Mr. Borchardine where they remained between seven and eight o'clock and returned to the city of Washington in a light wagon, a grocer wagon or something, with chairs inside for the people to sit on, driven by Mr. Seeger, and with witness' husband and child, herself and child, Mr. Borchardine and the plaintiff inside; that it took about an hour or a little more to get into the city: when the party arrived in the city the plaintiff was sitting opposite to the witness and the wagon stopped at Saengerbund hall on C street and Mr. Borchardine and the plaintiff got out. The plaintiff got out of the back of the wagon and remained in the hall five or ten minutes. When he came out he came down the stairs and fell over—he came down the stairs and fell over a stone and flew right in the middle of the street. Witness was sitting in the

back of the wagon, the last seat in the back, and could not see the steps of the Saengerbund hall from where she was sitting, could see up the steps. The wagon was not slanting but the witness
30 was sitting slanting. The wagon stood parallel to the sidewalk and witness is not positive but thinks the horse stood facing towards 3rd street, about a couple of feet from the steps of Saengerbund hall. The night was clear but the street on our side was dark. Witness did not see the stepping stone before the plaintiff had fallen over it, but looked at it afterwards. It was about ten or twelve inches high, witness thinks, and the width was about the same, and in length about 2½ to 3 feet, but witness is not sure.

Q. Now state whether or not there was any light cast upon this stone.

Mr. THOMAS: That is a leading question.

A. The only light, as I have said, was from the hall window of the Saengerbund, and that was very little.

Q. Was there any gas lamp or street lamp near the place? A. As much as I can remember there was one, across the street, but there were trees between.

Q. What was the condition of the trees at that time? A. They had leaves on. The manner in which the plaintiff came down the steps of Saengerbund hall is this: He came down the steps the same as—like any one would—like any one would walk down the steps quickly; he was walking down the steps towards the street to get into the wagon and fell over the stone and flew right in the middle of the street. The witness did not see that the plaintiff was looking. There was not any light reflecting on the stone. The light from across the street was to the middle of the street. I could see very plain where he had fallen after he fell. The light across the street was between the trees. I know that because of the reflection of the light. You could see the leaves on the middle of the street from the reflection of the light, and the wagon was a
31 little distance from the stone when they came out. The wagon did not have much light. In reference to the light across the street the wagon was located towards 3rd street when the parties went in. Witness did not observe the stone as the plaintiff went in the hall. Witness did not remember the exact position of the wagon when the plaintiff went out of it. When plaintiff came out of the hall the back of the wagon was about two feet from the carriage stone and it was parallel with the sidewalk.

Cross-examination:

The wagon had a seat in front, a cross seat and chairs in the back. We sat on chairs, I believe; the others sat on boxes; that is, my husband and myself each had a chair and the others sat on boxes inside of the wagon. Mr. Borchardine was in the front towards the driver but no one sat with Mr. Seeger on the front seat. The curtains were down inside of the wagon so that it was completely dark

inside of the wagon. We had no light. The floor of the wagon was about a yard from the ground and it had a small tail gate. The witness did not notice the streets going to the Saengerbund hall. Doesn't remember whether they came up 4½ street or 3rd street. When we got to Saengerbund hall that night, witness says, I cannot tell how the team was facing. Plaintiff got out of the tail end of the wagon. After plaintiff and Mr. Borchardine got out of the wagon it moved a little towards the end (indicating) it made it straight with the sidewalk, but witness cannot tell whether it got further away from Saengerbund hall or not by doing that. Witness does not recollect how the wagon stood when they got to Saengerbund hall. Witness faced the tail end of the wagon and the back of the wagon was a little distance from
32 the stone up parallel to the sidewalk, about two feet. The wagon did not turn around, did not go any distance away, just straightened out, and when witness says it moved a little, by "a little" she means until the wagon was straight with the sidewalk but doesn't know how it was moved. Witness could not see through the curtains in the wagon. Witness was on the side of the wagon facing Saengerbund hall, the last seat of the wagon. The seats were never moved. Witness saw plaintiff come down the steps of Saengerbund hall. Plaintiff came out first and Mr. Borchardine came back of him. The plaintiff came down quickly, like any man would come down the stairs, and struck the carriage step, walked right straight out and flew into the middle of the street about three or four feet from the curb. He fell over the stone and flew right out into the middle of the street, clear into the roadway. When the plaintiff fell Mr. Borchardine was on the Saengerbund steps but witness does not think he was on the top landing. Photograph shown witness who says that the position of the carriage step on that night is the same as shown in the picture. Mr. Borchardine at the time the plaintiff fell was on the upper portion of the stairs, and at that time the plaintiff had come down and stripped over this stone step. (Witness indicated on the photograph how far the plaintiff fell out into the street. Makes a mark on the photograph showing how far plaintiff's feet were out in the street.) The plaintiff was about three or four feet from the tail end of the wagon when he lay in the street, and witness thinks Mr. Borchardine was still upon the steps. Mr. Borchardine and Mr. Seeger picked the plaintiff up. Witness could see plaintiff as he lay there but not very well. There was a gas light across the street with trees between the gas light and the body and there was a little light
33 coming from Saengerbund Hall vestibule, a very little. Witness does not think there was a light in the vestibule but there must have been glass doors in the vestibule through which a little light came. When witness looked out of the wagon at the stone, the witness was about two feet from the stone. Witness says she cannot tell whether after the wagon first stopped at the Saengerbund hall and the plaintiff and Mr. Borchardine had gotten out and gone into the hall, the wagon turned around and stood facing

in the opposite direction. Witness was asked whether she had not testified when her deposition was taken on the 13th of September, 1901, that the plaintiff was lying about 6 or 7 feet off from the curbstone in the street, and states that she made such a statement but that she thought it over since and does not think it could possibly be as much as 6 or 7 feet because that would be too far over and that the plaintiff was somewhere out in the street. Witness further testified that she did not know how the wagon stood when the plaintiff went into Saengerbund hall but knows how the wagon stood after the plaintiff had fallen, and that she now thinks it was standing towards Third street.

Q. Mrs. Wolff, did you notice any trees in front of the Saengerbund? A. No sir, I did not notice them.

Q. Did you notice any trees on the opposite side of the street? A. I noticed trees on the other side of the street.

Q. With respect to Saengerbund hall were they directly opposite or were they diagonally opposite? A. I cannot tell; I noticed the trees, that I know. The light must have been from the back of the trees.

34 Q. Why? A. Because it was not a bright light. I guess it was from behind the trees. Witness says she cannot tell what kind of trees they were, whether they were tall trees or short trees, nor can she tell where the lamp post was that was across the street, that is, not the exact place.

Q. You saw him fly through the air? A. Yes sir, I saw him fly.

Q. Did he make a clean sweep? A. He did not touch anything else before he fell.

Q. Then he simply struck the carriage step and flew right out into the middle of the street; is that right? A. That is as much as I can remember, yes.

Q. He did not strike the carriage step and fall right over into the gutter? A. No, sir.

Being asked with what speed plaintiff came down the steps, witness says he came down quickly. That is the only way I can explain myself.

Q. What do you mean by saying "quickly"? A. What I said before, the same as I meant it then, like any man would come down the steps. They don't walk slowly.

Q. Did he walk slowly across the pavement? A. I don't know how he walked across the pavement; I don't know about the pavement. I seen him come down and saw him fly from the carriage step into the street, that is all I know.

Thereupon, to further maintain the issue on his part joined, the plaintiff produced as a witness OTTO BORCHARDINE who testified as follows:

That he is a resident of the District of Columbia; that the plaintiff on the day of the accident came to his place at Suit-
35 land, Maryland, in company with Mr. and Mrs. Wolff and their two children; that they remained there until about 7.30 in

the evening; that the witness, the plaintiff, Mr. and Mrs. William Wolff and their two children drove in town in the wagon of Mr. Seegar; Mr. Seegar drove the wagon and no one sat on the front seat with him. There were two temporary seats put up on the sides of the wagon and a box and a board or it might be chairs. Mr. and Mrs. Wolff and the two children and the plaintiff and witness were in the rear of the wagon; and it took about an hour and one-half to drive from his place and the party arrived at Saengerbund hall about half past eight or nine o'clock in the evening; that plaintiff and witness went out of the wagon and went up the stairway and took one glass of beer and one cigar and stayed there about five minutes and came right out "because we would not let them peoples wait, you know." Plaintiff came out first and witness shut the door. When plaintiff came out he went right fast down the stairway, and the next thing I saw I was standing on the platform and saw plaintiff fall over that carriage step, and I said to him, "What's the matter here, why don't you get up?" He said he could not, and I rushed down the stairway at the same time that Mr. Seegar came from the front seat, and we picked him up and put him in the wagon. Plaintiff was about five or six feet from the curb and as he is not very tall it might be one of his feet was one foot from the curb or 18 inches, I could not say.

Q. State where this wagon stopped with reference to this stone when you got out. A. The wagon turned up there. For instance, there is a stone and the stone was right in between the two wheels, to my recollection, and when we came out of course the horse had moved in the meantime, and the stone was really on the back part of the wagon, the end of the wagon. The street was very
36 dark, according to my knowledge, and there was no light shining on this stone that I saw. I guess it was a brown stone and the size might be about 22 or 24 inches in length by 10 or 12 inches high, and 16 or 18 inches wide.

Q. How long had that stone been there, Mr. Borchardine, if you know? A. I have been a member of the Saengerbund, I guess, since 1889, and at the time we moved down there from Mr. Dismer's place I remember I saw that stone every day when we went to rehearsal. We moved down there, I think, in 1892 or 1893. The pavement was red brick and I think there were some trees right there. There is a light near the alley on the same side with the Saengerbund hall, between the Saengerbund hall and the alley, but I could not say whether there is a tree right there in front of the Saengerbund or not. There is a light on the other side of the street only, slanting from the Saengerbund nearer to Third street, in reference to Saengerbund hall in about the middle of the square. That light could not have shone on the stone because the wagon was right in front and the light could not be on the stone. Witness had noticed the stone many times before the accident but did not take any notice of the stone that night. When the witness and the plaintiff got out of the wagon they jumped over the tail board. Plaintiff did not get out from the side of the wagon and

step on the wheel. He could not have done that because there were two curtains on the side. The tail board is fastened with a spring and we got out and jumped down. The tail board was let down and we both jumped down. When the wagon was being driven into the city it did not stop at any place before Saengerbund hall was reached, nor did the parties in the wagon change their seats that I know of. To my knowledge the plaintiff and
37 myself were seated in the rear part of the wagon, and it took but an hour and a half and not three hours to get in from my place, which is at Suitland, Prince George's county, Maryland.

Q. That carriage step was there all the time that the Saengerbund had been there, was it not? A. Yes, sir.

Q. Could you tell us, give us an idea of about how many people visited the Saengerbund, generally speaking, in a season, who came in carriages? A. Sometimes there was one or two or three teams standing out in front and many times my wife and myself drove in from the country and we would only stay an hour or so and we left the horse standing outside. The stone was lying right about in the middle of the stairway and the wagon stopped so that the stone was just about in between the two wheels. If a man had stepped out of that wagon on the hind wheel he would not have stepped on the carriage step because it was in between the wheels. The carriage step would have been beyond him nearer the horse's head. The space between the two wheels of that wagon might be about two feet. Mr. Haglman was the doorkeeper of the Saengerbund, but he is dead now.

Q. How near the carriage step were the wheels of the wagon when you got out of it? A. It was right straight there, right on the curb, snug against the curb. I could not say whether the wagon was straight or diagonal because I never took any notice of it, of whether it was turned around a little bit or not. When we got out of the wagon we could see the steps of the Saengerbund, and there is a lamp in the vestibule, but I could not tell you whether it was burning that night. There is always a light in the hallway and it
38 throws enough light to see the Saengerbund door. Mr. Wolff came out first.

Q. Where did you stand when he was going down the steps? A. I was on the platform because I shut the door and I was the last one and I was just about at the platform, on top, when I saw Mr. Abe Wolff roll over the stone. (Photograph of the premises shown witness and then exhibited to jury,) and witness indicates where he was standing, saying: I was there with intent to go down the stairway. I was not standing, I intended to go down the stairway and at that same moment I saw Mr. Abe Wolff fall. I was about to go down the stairway.

Q. Where was he when you saw him? A. He fell right over the carriage step.

Q. Had he struck it when you saw him? A. The only thing I saw was his whole body fly right over.

Q. He was flying over when you started to go down? A. Yes.

Q. Did you see him going down the steps? A. Yes.

Q. How was he going? A. Right fast.

Q. Was he walking or running? A. You cannot run down the steps.

Q. If anybody can run down the steps, was he running? If it is possible? A. You cannot run down; he was only going right fast.

Q. It does not make any difference how fast a person comes down the steps, you would still call it not running? A. Not running.

Q. When you saw him out that way, having fallen, you
39 cried out to him, did you not? A. Yes; I said, "Get up," and he answered, "I can't."

Q. That is before you had left the top of the steps? A. No. In the meantime I came down the steps, and I seen him lying there and I rushed as quick as I could.

Q. Did you run down or walk down? A. I came right fast down the steps.

Q. And did you go down as fast as the plaintiff came down? A. It might be.

Q. You hastened to get to him? A. Yes.

Q. You were in a great hurry to get to him? A. Yes, sir.

Witness further testified that the tail end of the wagon when plaintiff was lying in the street was right beyond the stone. There is this stone and there was the tail end of the wagon, and the horse stood with his head towards 3rd street. The wagon must have changed its position; the horse must have stepped up one step.

Q. You saw the carriage step when you were standing on the steps of the Saengerbund? A. I could not see it—and at the same time I was not standing there. At the same time that I saw him falling over it I was coming down, and I could not see the carriage stone.

Q. You knew what he had fallen over, did you not? A. I knew what he had fallen over?

Q. Yes; did you not know what he had fallen over? A. That he fell over, certainly.

Q. You knew what it was? A. I could not say that he fell over the stone, I could not say what he fell over, I could not tell that. I found out that afterwards.

40 Q. Did you not see the carriage stone that was at the curb there, when he fell did you not see it? A. I could not see it.

Q. Did he cover the whole of it? A. No, but he must have struck the stone with his foot and fell foremost.

Q. Did you not see what he had struck? A. No, not until after while we found out.

Q. When did you find out what it was that he had struck? A. The moment after I came down and I seen him lying right over that carriage stone.

Q. How far was the wheel of the wagon from the carriage step when the plaintiff fell on the street? A. The wheel from the carriage stone?

Q. Yes. A. The end of the wheel was right at the carriage stone, one end of the carriage stone.

Q. And where was he lying? A. Right in the street.
Q. Behind the end of the wagon and behind the wheels of the wagon? A. Yes sir, behind the wheels of the wagon. The end of the wagon was perhaps a foot or two from the step and plaintiff might have fallen about five feet. I am not mistaken in my recollection when I say that when I came out of the Saengerbund the horse remained with his head to Third street.

Thereupon, to further maintain the issue on his part joined, the plaintiff produced as a witness G. A. SEEGAR who testified as follows:
Witness drove the wagon in which the plaintiff was seated from Mr. Borchardine's place.
41 We drove in there; I had my wagon and Mr. Borchardine and Mr. Wolff said that it was Sunday evening and they wanted to make another visit to the Saengermund. We decided when we passed 4½ street to go up there, and we drove up 4½ street to C street and to the Saengerbund hall and went in. We stopped in there a few minutes and came out again. The night was dark and the pavement was dark. There was no light so that you could see much, and as you know, when a person comes out from the light into the dark it is very dark. And Mr. Wolff wanted to get in and when he came to the stone he stumbled and fell over and struck his leg here and fell into the street, and me and Mr. Bordhardine picked him up and put him in the wagon, and from there I drove him to Mr. Koezel's and then I went in my wagon for the doctor, Doctor Kolipinski, and brought him there, and he examined it. Witness, continuing, testified there was no light on the stone and that it was a dark-brown sandstone in color and the pavement was an old brick pavement with many holes in it, and that the stone was about one foot high and about 12 or 15 inches wide and the witness thinks it was about two feet long. Witness states that the plaintiff and Mr. Borchardine sat on the back and on the sides, on one of the long seats in the wagon that was made up of the board and the two boxes, and that it took about two hours to drive in; that the seats were not changed as witness remembers; that the curtains were fastened down so that the party had to get out on the back. Being asked at what point in front of the Saengerbund building the wagon stopped, the witness says: Whether I stopped exactly in front of the Saengerbund I don't know; it may have been a few feet further east. I stopped on the east side of the steps of the Saengerbund hall. I stopped near the steps but maybe it was a foot away or a foot and a half away in the street, I don't know. I know that it was
42 past the stone; maybe it was near the stone; I cannot say. I don't know how long my wagon was. Maybe it was ten feet, a little more or less.
Q. Did your wagon move after you stopped until Mr. Wolff came out? A. I don't know, sir; it may have moved a few inches. You know just how a horse is, sometimes he takes a step ahead or a step back. I did not have to move him to get the wagon into a better position, so that the wagon was in about the same position when

Mr. Wolff and Mr. Borchardine came out as it was when they went in. My wagon was right close up to the curb, not further away than an inch or two, and when I drove up to the Saengerbund I drove into the line of the curb so as to get as near as possible. When plaintiff and Mr. Borchardine got out of the wagon they got out of the back and went across the sidewalk right up the steps.

Q. When you were speaking about that you stopped east of the Saengerbund steps, what do you mean by that? A. Well, I mean my horse faced east.

Q. And how far was your wagon past the Saengerbund steps? A. As I said before, it stood so a person could step out and get up those steps; it was straight in line with those steps.

Q. They were straight in line. What do you mean by that, that they were straight in line where you were sitting? A. Pretty near; I do not know exactly whether it was a few inches further east or not.

Q. You mean the tail end of your wagon was? A. Yes.

Q. You cannot say whether the tail end of your wagon was a few inches east of the steps of the Saengerbund or not? A. Yes, sir.

43 The witness further testified: My wagon, as much as I can recollect, the end of my wagon was near the carriage step, I think part of the hind wheel covered the carriage step, but I cannot recollect any more how much of the carriage step was back of the hind wheel. A foot, and maybe it was fifteen inches of the stone was not covered. I cannot tell. That carriage step was covered a little ways with the hind wheel, but I did not measure the distance, perhaps it was half way or one-third of the way. I don't know how much it was. I found that out later, because I stepped down from the wagon and walked around on the pavement and saw it. Witness saw plaintiff strike the stone and fall over it, and went to his assistance.

Q. How far did he fall? A. I think he fell almost the distance of the wagon.

Q. Did he fall past the wagon? A. I think he did. If the wagon had backed I think it would have run over his back, and both of the wheels would have run over him. When the plaintiff came down the steps I was standing in front of the horse. I suppose I was taking care of my horse, and I stepped out of the wagon to take a walk along the sidewalk. I was near the head of my horse when the plaintiff came down the steps.

Q. While you were walking up and down the sidewalk, did you see this carriage step? A. Yes, sir.

Q. How far were you away from the carriage step while you were walking up and down the sidewalk? A. Different distances; sometimes six feet, sometimes maybe 10 or 15 feet. Witness says that when he was ten or fifteen feet away he could not see the carriage step, nor when he was 6 feet away could he see it.

Q. Then when did you see it? A. When I was near it.

44 Q. What do you mean by near it? A. When I go close to the step.

Q. What do you mean by close to the step? A. To the Saengerbund steps.

Q. What do you mean by being close to the steps—do you mean at the foot of the steps? A. Yes.

Q. When you were at the foot of the steps and would turn around and look, could you see the carriage step? A. Yes, sir.

Q. How far is the foot of those steps from the carriage step? It is the width of the pavement, is it not? A. Pretty near it.

Q. Standing at the foot of these steps, you saw the carriage step? A. I did not stand at the foot of the steps.

Q. Where did you stand? A. I kept walking.

Q. Well, you say you could see that step plainly? A. No, sir.

Q. Did you see it? A. Yes.

Q. Did you use glasses at that time? A. No, sir.

Q. And you could see it without glasses? A. Yes, sir.

Q. And you saw it that night? A. Yes, sir.

Q. Were there any lamps around there? A. Not on that side.

Q. Where was the lamp? A. On the other side, "caticornered."

45 Witness further testified that there was a light inside the Saengerbund but he does not know whether there was one in the vestibule. Witness thinks there was one inside the hall and there was glass in the doors that the light shone through but the light did not stream down the steps.

On redirect examination witness stated that that he had been to Saengerbund before and knew the position of carriage step.

Thereupon, further to maintain the issue upon his part joined, the plaintiff produced as a witness AMELIA BORCHARDINE, who testified as follows:

That she lived at Suitland; that she is familiar with the Saengerbund hall on C street; husband is a member of the Saengerbund Club; was familiar with it in 1895; knows the condition of the lights surrounding the stepping stone in 1895; there is a lamp post on the corner of the alley on the same side of the street as the Saengerbund and one on the other side of the street, but the place where the carriage stone is is very dark and the witness fell over it one time herself.

Cross-examination:

I cannot remember that I was ever in front of the Saengerbund hall on C street in the fall of 1895, particularly, but we almost always came in when there was any entertainment. I cannot answer you as to how many teams I saw there in the fall of 1895, I do not know that any more. I think we went there if there was an entertainment, but I cannot remember whether there was an entertainment in that month. I don't remember whether I was there in November, 1895, or October, 1895, if there was anything going on in August I guess we were there. We came there about eight o'clock and would stay there until about ten and then go home. We would come

in our wagon and bring people along sometimes. We got out in front of the Saengerbund but not on the carriage step; we might get out there on the carriage step sometimes, but I cannot remember
46 any more. We did not always see the carriage stone when we drove up there; we knew it was there, but it was too dark to see it; it was just the color of the pavement. The color of the carriage stone was grey and the pavement is a concrete pavement and looks like the asphalt looks. I don't think it was a smooth concrete sidewalk, at the time we are talking about, I think it was a brick pavement. When I said a grey pavement I meant the street, not the sidewalk, and the color of the carriage step was grey. I have not taken so much notice of the carriage step that I can tell you whether it was lighter or darker than the street. I think the street in that square is dark all the time, and that it is a very dark street. Yes, there are lamps located there. There is a light across the street, but it was no light over there very much. I think that light across the street is more towards 3rd street than it is towards 4½ street, and it is not immediately opposite the Saengerbund place. There is another lamp on the corner of that alley some three or four houses from the Saengerbund place not further away than the length of this room. The lamp across the street was as far away from the carriage step as one-half as long as that room is from the carriage step across the street, but I cannot swear that the lamp across the street was about the length of this room from the carriage step. I never took much notice of the lamps around there. I never thought I would have to say anything about it. I never observed it, nor had occasion to notice the lights in front of the Saengerbund before this came in. There was always a light in the hall in 1895. I don't think there was a light in the vestibule, I think the light was inside the hall. I am not positive there was not a lamp hanging in the vestibule of the Saengerbund before you entered the hall. I won't say anything on that question
47 because I don't know, I cannot say there was and cannot say there was not. I don't know whether there was a light in October, 1895, or not. I never made any experiment with the lamps on C street to see how far they would cast a shadow and cannot tell you how far the shadow of the leaves of the trees was cast from that light on C street, nor how far the shadow of the tree just towards 4½ street was cast by the lamp or the light from the Saengerbund hall. I cannot tell you how far the shadow of the carriage was cast on the sidewalk from the lamp on the north side of C street for I never took so much notice of it, nor can I tell you how far the shadow of the carriage step was cast out into the roadway from the light in the Saengerbund hall. I am not much of an expert of light at that point.

Thereupon the plaintiff, having given evidence of the extent of his injury by Dr. Kolipinski, rested.

Whereupon the defendant, to maintain the issue on its part joined, produced the following testimony: GEORGE C. BURNS, who testified

that he was general inspector, computor and draftsman in the District engineer department, and of the correctness of the plat and the distance and measurements shown therein referring to that portion of C street including Saengerbund hall and vicinity, which said plat as well as the photographs, before and hereinafter referred to, are to be used in any appellate court the same as if fully set out herein.

Thereupon the defendant, to further maintain the issue on its part joined, produced EDWARD V. MURPHY, who testified that his brother, Daniel Murphy, purchased premises No. 314 C St., N. W. and moved in the same in the fall of 1875, and there resided until about 1894 or possibly 1895, and that the said Daniel Murphy has been dead since 1896; that the carriage step mentioned was in front of
48 the premises and has been in front of the premises ever since witness can remember and long before his brother took possession of that house; and that it is witness' impression that it was put there when the house was built, and that the stone remained there down to the time of the death of Daniel Murphy; that it was a brownstone step something like two feet long, possibly one foot wide or a little more than that. That the stone in front of the adjoining premises and the stone that was spoken of are precisely the same.

Thereupon the defendant, to further maintain the issue on its part joined, recalled the said GEORGE C. BURNS, who testified that the dimensions of the carriage step in front of No. 312 C street are 29¾ inches long, 13¾ inches wide and with a rise from the sidewalk of 7¼ inches.

And thereupon said witness further testified that a straight line from the middle of the lamp post at the alley would run outside of the line of the trees on C street in front of Nos. 314 and 312 and that it would miss the trees.

And, thereupon, two photographs, taken by witness during the process of the trial showing the lamp post represented on the plat mentioned and being on the opposite side of the street, were exhibited to the witness who stated that he took said photographs from the base of the Saengerbund steps about on a level, about five feet above the surface; that the boughs of the trees shown in the photographs do not come out in the street; that none of the boughs of the trees are lower than the lamp, but that witness does not know how often the trees are trimmed; that the curb of the roadway on the Saengerbund side of C street is six inches higher than the roadway and it has been there over eight years having been placed there before witness was employed by the District; that there is now a little tree in front of the Saengerbund, but witness does not
49 know whether there was a tree at that place in 1895; that there is a tree 13 inches in diameter west of the Saengerbund hall, distant from the center of the steps about 12 feet. Witness further testified that the boughs of the trees on the north side of C street diagonally over from the Saengerbund hall are higher than

the lamp and that the young tree, mentioned by him, is about 2 inches to 1½ inches in diameter.

And, thereupon, the defendant, to further maintain the issue on its part joined, called TRUMAN KANHAN, who testified that he was superintendent of parking and trees in the District of Columbia and had been so employed very nearly 18 years; that the trees on C street in the neighborhood of the Saengerbund are silver or soft maple trees; that the tree directly opposite the Saengerbund is apparently between twenty and twenty-five years old and was planted before witness came in parking commission; that the trees on C street, and particularly on that square, have been kept trimmed up high all the time; and that there is no indication on that particular tree that any limb had been cut off near the bottom at any time from the side next to the street or on the side next to the lamp; that there is no indication of such taking, and if they had been taken off within the last six or eight years, witness thinks there would have been indications if the limbs had been of any size; that the tree in front of the Saengerbund building the small tree, was planted last spring, a year ago, probably not until last spring; that witness knows it has not been planted there two years, and that when it was planted there, there was no tree at that place; that the leaves of a silver maple tree in the city of Washington fall about the 15th of October, and when they begin to come down they come down pretty rapidly until they are bare of leaves.

Cross-examination:

In a very wet season these leaves might stay on a little
50 longer, and in a remarkably moist and warm season they remain a little longer than in a cold dry season; that very few of the silver maple trees retain their leaves up in November; that such trees do not have very dense foliage and the leaves are not very dark; and that the limbs of said trees, as a rule, grow obliquely from the trunk; that the limbs run straight out and perhaps some of them probably droop with the rain on them, but witness did not observe that it was so at the place spoken of; that the limbs of the particular tree across from the Saengerbund run up and are not drooping and that nothing could bring them down to a point below the lamp that is now there, without breaking them; that witness saw these trees yesterday and there is not a limb that you could bring down below the level of the lamp, and that the trees on that street have not been trimmed in the last two years, but witness cannot say whether they were trimmed in 1895 or not.

And thereupon the defendant, further to maintain the issue on its part joined, called ADOLPH LEVY, who testified that he was a member of the house committee of the Washington Saengerbund and that the Saengerbund took possession of the present premises in the spring or fall of 1893; that there has been no change in the steps

of the Saengerbund since then; and that the carriage step mentioned was there when the Saengerbund took possession of the premises, and the said carriage step remained there until about two years ago, when a new cement walk was laid, and says, we gave it away and had it removed; that the carriage step in front of 312 C street is identically the same as the one that was removed; that there was no tree in front of the Saengerbund in the month of October, 1895; that the hallway of the Saengerbund is lighted at night by a large lantern in the vestibule and a gas light on the entrance and on the stairway upstairs there are two large lights; that the light in the hallway is at the foot of the stairway that leads upstairs, on the newel
51 post; that the lantern in the vestibule has been there ever since the Saengerbund has used the premises as a club-house; that the lamp in the vestibule and other lamps are at all times lit at night; and that when that light is lit in the vestibule it lights up the steps and pavement in front of the club-house as bright as a bright moonlight night; that when the light in the lamp diagonally opposite on the street is lit, it makes the light on the pavement in front of the club-house and the stone very bright; that the light on the corner of the alley west of the club-house lights up the pavement for a house or two, that the light in the vestibule lights up to the full extent of the sidewalk and you must see the carriage step if you are walking down the steps; and that a person ordinarily coming down those steps can see that carriage step. Witness did not testify as to condition of light the night of the accident and cannot say whether or not you could see the carriage step if the light was out.

And thereupon the defendant further to maintain the issue on its part joined, called FRANK CLAUDY, who testified as follows:

That he is the president of the Saengerbund and has been continually its president since 1895; and that there has been no change since 1893 in the arrangement in front of that building including the steps coming down to the pavement. Witness further testified that the carriage step mentioned was in front of the premises in 1893, and that it was removed in 1900, when the sidewalk was relaid; that the vestibule of the club-house is lighted by a very large lamp with a very bright light, large burner; that back of that lantern is a door with the sides also of glass, glass panels; that back of this glass door, about nine or ten feet, there is a stairway that goes to the upper story, on the newel post of which there is a bronze figure on which are three globes, and that those three
52 g-obes are lit regularly by gas light; that Sunday night is the night in the week in which the club-house is the most patronized by its members and such was the practise in October, 1895; and that ever since the time the club-house was purchased the Saengerbund has pursued one custom regularly, every Sunday evening to light up everything that is "li-table," to coin a word; that when the hall and vestibule lights are lighted, these two lights combine, or rather the three lights, two in the hall and one in the vestibule, and throw a very bright light on the steps and sidewalk

so bright that I have tried, for fun, to throw a five-cent piece on the sidewalk and I have then looked out and seen it and then gone down on the street and picked it up—saw the five-cent piece from up above; that the light across the street adds to the brightness of the sidewalk; that when all the lights are lit it is absolutely impossible not to see that stone when you are on the top of the steps or coming down. It is as bright as bright can be. That in the years 1893, 1894 and 1895 there were no trees immediately in front of the club-house, but there is now a very young tree which has been planted since the sidewalk was relaid; and that there has been no change in the position of the two lamp posts, one at the corner of the alley and the one across the street, and that the only change that has been made there is that of a new pavement and the carriage step has been taken away and a new tree planted there; that there were no accidents reported in reference to this carriage step until witness heard about this accident a month or so ago. Witness had never been at house when vestibule light was out and only hall light was burning and gave no testimony as to condition of lights night of accident.

And thereupon the defendant, further to maintain the issue on its part joined, produced JOHN WALDMAN, vice-president of the
53 Washington Saengerbund who testified in substance to the same effect as the previous witness, Frank Claudy and GEORGE SMITH, the caterer of the Saengerbund since the 6th day of May, 1897, who testified to the same effect, and JAMES SPRINGHAM, who testified that he has been doorkeeper of the Saengerbund since 1897 and has always been there on Sundays and that the carriage stone was there when he first went there, and described how the premises were lighted substantially as testified to by the previous witnesses; and GEORGE H. KOLB, who testified he was employed at the Saengerbund in 1897, and that the light from the vestibule and hall of the building lit up the steps and the pavement down to the carriage stone, and that any person coming down the steps when these lights were lit could see the carriage step; but none of them testified as to condition of lights the night of the accident.

Thereupon the plaintiff, in order to maintain the issues on his part joined, produced as a witness JOHN B. MOON, who testified as follows:

That he lived at 306 C street, N. W., Washington, D. C. and has lived there since 1895; at one time was a member of the Saengerbund Association; branches on the trees across from the Saengerbund hall had been lopped off; one of the limbs extends half way across the street, pointing towards the Saengerbund; the end of this limb which would point downward has been cut off; the whole east side of the tree west of the lamp post has been trimmed up; the tree on the same side of the Saengerbund and west of the Saengerbund has had branches cut off near the top; the trees on the opposite side of the street and pointing toward the Saengerbund hall extend more than half way across the street; remembers the wind storm;

it occurred after he moved on C street; after the storm, could hardly get along C street on account of the branches that were in the street.

54 On cross-examination, witness testified that he was raised on a farm and was familiar with trees; left the farm when about twelve or thirteen years of age, didn't know that there were lace curtains on the panels of the door; knows that you could not see through the door; might have been stained glass; does not know whether it was stained glass or lace curtain; when you rang the bell could not tell whether anybody was coming or not to open the door; could not distinguish the figure or the face of the person through the door; could not tell whether it was light or dark on the inside; examined the trees on two occasions; there is a tree directly opposite the Saengerbund and a little east of a line directly north of the entrance of the Saengerbund.

This is the substance of all the testimony.

Whereupon the defendant moved the court to instruct the jury to render a verdict for the defendant upon the ground that the plaintiff had not made out a case, and over objection of plaintiff the court granted said motion, to which ruling of the court the plaintiff then and there duly excepted, and the jury returned a verdict for the defendant in accordance with the court's said direction.

All of which exceptions, as stated in the foregoing bill of exceptions, were duly noted by the court on its minutes at the time the said were severally taken, and the said several exceptions are signed as the several exceptions taken at the trial of the above-named case this 30th day of June, 1902, *nunc pro tunc*.

E. F. BINGHAM, [SEAL.]
Chief Justice.

55 *Memorandum.*

June 30, 1902.—Time to file transcript further extended to July 31, 1902.

Order for Record.

Filed July 14, 1902.

In the Supreme Court of the District of Columbia, the 14 Day of July, 1902.

WOLFF *vs.* D.C. } At Law. No. 41533.

The clerk of said court will please make up record in above cause as follows:

1. Original declaration and last amended declaration, filed August 20, 1901, as amended January 13, 1902; and pleadings thereon and judgment of court.

2. Appeal to Court of Appeals & several proceedings thereon.
3. Bill of exceptions (original).

JOHN C. GITTINGS,
D. W. BAKER,
Attorneys for Plaintiff, Appellant.

I consent:

E. H. THOMAS,
Attorney for D. C.

56 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 55, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 41,533, at law, wherein Abraham Wolff is plaintiff and The District of Columbia is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 25 day of July, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1238. Abraham Wolff, appellant, *vs.* The District of Columbia. Court of Appeals, District of Columbia. Filed Jul- 28, 1902. Robert Willett, clerk.

WEDNESDAY, *March 4th, A. D.* 1903.

ABRAHAM WOLFF, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 1238.

The argument in the above entitled cause was commenced by Mr. John C. Gittings attorney for the appellant, and was continued by Mr. E. H. Thomas, attorney for the appellee.

THURSDAY, *March 5th, A. D.* 1903.

ABRAHAM WOLFF, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 1238.

The argument in the above entitled cause was continued by Messrs. E. H. Thomas and A. B. Duvall attorneys for the appellee, and was concluded by Mr. D. W. Baker, attorney for the appellant.

ABRAHAM WOLFF, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 1238.

Opinion.

Mr. Chief Justice ALVEY delivered the opinion of the court:

This is an appeal from the supreme court of the District of Columbia. The action was brought by the appellant against the District of Columbia to recover damages suffered by the plaintiff, occasioned, as alleged, by what is contended to be a nuisance or an unlawful obstruction allowed to exist in C street N. W., in the city of Washington, by the defendant, the municipal corporation of the District of Columbia.

The cause of action, as set forth in the amended declaration of the plaintiff, is stated to be that the defendant, as a municipal corporation, was in duty bound to keep the sidewalks of the streets in the city of Washington free from obstructions, nuisances, or incumbrances, so as to be safe for all travelers thereon, including the plaintiff; and the breach of duty of the defendant, as alleged in the declaration, was, that the defendant wrongfully and negligently allowed "a certain large stone, several inches high above the surface of the sidewalk, usually termed a carriage step, to impede travel and incumber that part of said sidewalk which was opposite to and in front of a certain house known as the Saengerbund hall, between Third and Four-and-a-half streets on C street northwest," during the night of the 27th day of October, 1895, while said street was enveloped in darkness, without fixing any light or sign at or near said

stone, and without placing any watchman or other person to warn plaintiff of its existence, position, and location, and without placing any guard or screen around said stone, by means of which the plaintiff stumbled and tripped against and fell over said stone and was injured, without any neglect on his part, and he claims $25,000 damages.

The defendant pleaded the general issue plea of not guilty, and the case was tried and resulted in a verdict and judgment for the defendant.

There was considerable proof taken at the trial, both as to the occurrence of the accident and as reflecting upon the question of contributory negligence of the plaintiff, assuming that it might be shown that there was negligence on the part of defendant. But in the view that we take of this case, the question of contributory negligence on the part of the plaintiff, in producing the injury complained of, is not an element in the case, and therefore is not a matter for consideration. The carriage block or step over which the plaintiff fell and injured himself is shown to have been of the ordinary size and character, a block of brown stone a little more than two feet long, about fifteen inches wide, and about eight inches high from the surface of the pavement, and occupied a position in or at the curb dividing the street from the sidewalk, immediately in front of the door of the Saengerbund building, No. 312 C street, N. W., on the south side thereof; and that this block of stone or carriage step had been there from the time the building was erected, many years prior to the time of the accident, and without question by anyone. It was similar in size and character to the one set in the curb in front of the adjoining building, No. 314, and which had been used for many years, according to the testimony in the case. The plaintiff, in coming out of the Saengerbund building, by a quick and rapid gait, and intending to go to the vehicle awaiting him in the street in front of the door of the Saengerbund, stumbled over the carriage block at the curb, and was thrown down, and fractured his leg. He swears that he did not see the carriage block in his way, and that there was not sufficient light to enable him to detect his danger.

At the close of the evidence the court below, being of opinion that there was no case made out for the plaintiff, instructed the jury to render their verdict for the defendant, which was accordingly done, and the plaintiff excepted; and from the judgment the plaintiff has appealed.

The error assigned is, that the court below committed error in directing the verdict for the defendant.

It is contended by the plaintiff that the carriage block in question was an unlawful obstruction of the sidewalk, and consequently a public nuisance, and that being so, it was the plain duty of the municipal authorities of the District to see that all sidewalks were kept free from obstruction of every kind and description; and sections 222, 225, 226, 227, and 229 of the Revised Statutes relating to the

District of Columbia are cited and relied on in support of the proposition.

By section 226, Rev. Stats. D. C., it is provided that "it shall be the duty of the Chief of Engineers, in charge of the public buildings and grounds, to cause obstructions of every kind to be removed from streets, avenues, and sidewalks in the city of Washington, as have been or may be improved in whole or in part by the United States, and keep the same, at all times, free from obstruction." And by section 229 it is provided that "if any person shall place any obstruction on the streets, avenues, or sidewalks so improved by the *United States, such person shall pay the cost of removing the same*, and shall be subject to a penalty of ten dollars, to be recovered as other debts are recovered in said District, for each and every day the obstruction may remain after the Chief of Engineers shall have given notice for its removal."

Without stopping to inquire what duty these sections of the Revised Statutes imposed, if any, upon the Commissioners of the District, the question here presented is, whether an ordinary carriage block or step, such as we have in this case, and such as has been in use from time immemorial, as an incident or appurtenant of convenience, if not of necessity, to places of business and residences in cities, constitutes an obstruction within the meaning of the sections of the statute quoted. It is clear, the provisions of the statute do not apply to many things that may, in a sense, be regarded as obstructions to the sidewalks of a street. They certainly do not apply to the shade trees growing along the sidewalks, nor to lamp posts, water hydrants, awning posts, telegraph or telephone poles, that we find everywhere, in the city, along the sidewalks. All these things may be regarded, in a particular sense, as obstructions, but they are not such within the meaning of the statute. They are objects allowed and authorized, by immemorial custom and usage, as being necessary to the health, convenience, protection, and enjoyment of the homes and lives of the inhabitants of the city. Where these objects of convenience and comfort have been subject to proper regulation, as they always are and should be, they have never been regarded as nuisances, either public or private. And in the case of a carriage step or block, it is of such reasonable convenience and necessary appurtenant to dwellings and places of business on the streets of a city that the right to maintain it, of a proper size and in a proper position, has seldom been attempted to be questioned. The legal existence of carriage steps or blocks was fully recognized in this city long before the occurrence of the accident, the subject of the present action, and have been regulated by both the building and police regulations prescribed by municipal authority. Their legal existence has been explicitly recognized by this court in the case of Howes *v.* District of Columbia, 2 App. D. C. 188, 22 Wash. Law Rep. 41, and that is in accordance with decisions of the highest authority elsewhere.

In the case of Du Bois *v.* City of Kingston, 102 N. Y. 219, it was

the unanimous opinion of the court of appeals of New York, that a stepping stone in the front of a public building, just inside the curb of the sidewalk, was not such an obstruction as would render a city liable for an injury sustained by a person falling over it, even though others had previously been injured by falling over the step. It appeared that the plaintiff was injured while running to a fire, which appeared to be in the direction of his own house, in the city of Kingston, by falling over a stepping stone, lying in the sidewalk in one of the streets of the city. The stone was 3 feet 4 inches in length, 20 inches wide, and 14 inches high. It lay lengthwise with the curb and on the side thereof, in front of the building containing the postoffice, a music hall, and several stores. In the opinion, the court said: "Actions against municipal corporations for injuries sustained by individuals while using or passing along its streets are founded upon the ground of negligence of its officers in performance of their official duties, and can not be maintained without evidence showing that they have been derelict in this respect, by means of which the injury has been sustained. We think there was no such proof upon the trial of this action. The stepping stone over which the plaintiff fell and was injured was not of unusual size or of an improper construction, nor was it located at an improper place. It was placed in a position on the sidewalk most convenient for persons who should alight from a wagon or carriage or get into the same from the sidewalk, and thus it was a means of accommodation to those who had business at the postoffice, or in the building in front of which it was located. It was not any more exposed than was essential for its proper and useful location." And in the conclusion of the opinion it was said: "It would be extending the rule of the liability of municipal corporations far greater than has yet been done in any decided case, to hold that they are liable for assenting to the placing of stepping stones on the edge of sidewalks in front of hotels, stores, public buildings, and private residences. The courts have gone quite far in holding such corporations to a very strict responsibility in reference to accidents caused by a failure of their officers to keep the streets and sidewalks in a proper and safe condition, but it would be adding to the corporate liability beyond reasonable limits to hold that stepping stones, which are almost a necessity in providing for the interest, comfort, and convenience of the public in the maintenance of walks, avenues, and streets, constitute a nuisance or obstruction, and that municipal corporations are liable for damages by reason of accidents caused thereby."

In the more recent case of Roberts *v.* Powell, 168 N. Y. 414, the same principle is very fully laid down. In this latter case the action was brought against the owner of the dwelling in front of which the carriage block was placed. It was held by the unanimous opinion of the court, that the block being of an ordinary size, and placed in the usual position at the curb, was not an unlawful obstruction of the sidewalk, and the plaintiff could not recover for injuries received

by stumbling over the step. In that case, on the night of the accident, the plaintiff, while walking rapidly on Fifty-eighth street, crossed the street diagonally from the defendant's house, in order to take a cab, and stumbled over a stepping stone or carriage block maintained by the defendant in front of her residence. The stone over which the plaintiff fell was 18 inches high, 13 inches long, and 16 inches wide. In the opinion the court said:

"The stepping stone in this case, located upon the sidewalk in front of a private house, was a reasonable and necessary use of the street, not only for the convenience of the owner of the house, but for other persons who desired to visit or enter the house for business or other lawful purpose. It did not interfere in the least with the use of the roadway or bed of the street; nor did it interfere to any appreciable or unreasonable extent with the use of the sidewalk. There were eight feet of a clear, open space upon the sidewalk for the use of travelers, and the fact that the plaintiff, while hurrying in the night time to take a cab, stumbled over the stone, when the place was well lighted and the object plainly visible, does not prove, or tend to prove, that the defendant was guilty of any wrong or breach of duty in maintaining the stepping stone in front of her house. It is true that the plaintiff was injured, but that was the result of an accident, due possibly to his own fault, but at all events not to any fault on the part of the defendant, or to any unlawful obstruction by the defendant of the street. The question involved in the case is, we think, well settled by authority. Dubois *v.* Kingston, 102 N. Y. 215; Dougherty *v.* Trustees, etc., 159 N. Y. 154. While it is said that these cases involved only the question of liability on the part of a municipality for negligence, they also decided that the existence of objects of this character in the streets is lawful. If the city could — be held liable for permitting them to be there after notice, neither can the defendant be held liable for placing them there. The question involved in this class of cases is whether the object complained of is usual, reasonable, or necessary in the use of the street by the owner of the premises, or any one else."

There are other courts than those of New York that have maintained the same principle. City of Cincinnati *v.* Fleischer, 63 Ohio St. 229; Macomber *v.* City of Taunton, 100 Mass. 255; Cushing *v.* Boston, 124 Mass. 434; Horner *v.* City of Philadelphia, 194 Pa. St. 542.

Upon general principle as well as upon authority we are clearly of opinion the carriage block or stepping stone in question was not an unlawful obstruction of the street or sidewalk, and that the defendant is not liable for the injury received by the plaintiff in stumbling and falling over the stone.

But the plaintiff contends that even conceding that the carriage block in question was not an unlawful obstruction, and did not constitute a public nuisance, yet the street in that particular section was defectively and insufficiently lighted, and because of such defective and insufficient lighting of the street and sidewalk, the

plaintiff ran against and stumbled over the block or stepping stone and was injured, and that the defendant corporation is liable for such injury, because of the neglect to properly light and keep lighted the street and sidewalk where the accident occurred. But whatever insufficiency may have existed in the light upon the occasion of the accident, (if any insufficiency did in fact exist), such an action as the present is not the remedy for the consequences of such defect. Money is annually appropriated by Congress for lighting the streets of the city; but whether such appropriation be sufficient or insufficient, the courts cannot determine; nor can they determine how the lights shall be distributed through the city; or how any particular street or section of a street shall be lighted, whether by few or many lights or whether by gas or electricity. These are matters that are confided exclusively to the judgment and discretion of the municipal authorities.

Finding no error in the ruling of the court below directing the verdict for the defendant, we must affirm the judgment, and it is so ordered.

Judgment affirmed.

TUESDAY, *April 7th, A. D.* 1903.

ABRAHAM WOLFF, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 1238, April Term, 1903.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court, in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE ALVEY.

April 7, 1903.

TUESDAY, *June 2d, A. D.* 1903.

ABRAHAM WOLFF, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 1238

On motion of Mr. D. W. Baker of counsel for the appellant, it is ordered by the court that a writ of error to remove this cause te the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of two hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Abraham Wolff, appellant, and The District of Columbia, appellee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 2d day of June, in the year of our Lord one thousand nine hundred and three.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, Abraham Wolff as principal, and A. L. Saltzstein, as surety, are held and firmly bound unto The District of Columbia in the full and just sum of two hundred dollars to be paid to the said District of Columbia — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of June, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court between Abraham Wolff, appellant, *vs.* The District of Columbia, appellee, a judgment was rendered against the said Abraham Wolff and the said Abraham Wolff having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said District of Columbia citing and

admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Abraham Wolff shall prosecute said writ of error to effect, and answer all costs if he fail to make — plea good, then the above obligation to be void; else to remain in full force and virtue.

ABRAHAM WOLFF, [SEAL.]
By D. W. BAKER,
Att'y in Fact. [SEAL.]
A. L. SALTZSTEIN. [SEAL.]

Sealed and delivered in the presence of—
—— ——.

Approved by—
R. H. ALVEY,
Chief Justice Court of Appeals of the District of Columbia.

O. K.
A. B. D.

[Endorsed:] No. 1238. Abraham Wolff, appellant, *vs.* The District of Columbia. Bond on writ of error to Supreme Court U. S. Court of Appeals District of Columbia Filed June 4, 1903 Robert Willett clerk.

UNITED STATES OF AMERICA, *ss:*

To the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Abraham Wolff is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 4th day of June, in the year of our Lord one thousand nine hundred and three.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted
A. B. DUVALL, *Att'y D. C.*

June 6 / 03.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun 8, 1903. Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to — inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Abraham Wolff, appellant *vs.* The District of Columbia, No. 1238, April term, 1903, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 10th day of June, A. D. 1903.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,979. District of Columbia Court of Appeals. Term No. 62. Abraham Wolf, plaintiff in error, *vs.* The District of Columbia. Filed June 20, 1903. File No. 18,979.